Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the

Supreme Court Of The United States

OCTOBER TERM, 1995

WILFREDO MARTINEZ-RODRIGUEZ, an individual

Petitioner,

v.

RAFAEL COLON-PIZARRO, JUAN TRINIDAD-MARRERO AND LUIS ANTONIO VELEZ-RENTAS, individuals

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Jorge Ortiz Brunet *
John E. Mudd **
Ortuz Toro & Ortiz Brunet
P.O. Box 192064
Hato Rey Station
Hato Rey, PR 00919-2064
TEL. (809) 754-7698
Fax 766-1596

* Counsel of Record
** Of Counsel

48 pp

Questions Presented

1. Whether DeShaney v. Winnebago Dept. of Social Services, 489 U.S. 189 (1989) precludes substantive due process action based on an entitlement created by state law and violated by state actors.

2. Whether state actors' failure to provide protection to a policeman being subject of an attack by a fellow officer violated his equal protection rights.

Parties to the Action

Wilfredo Martínez-Rodríguez was the sole plaintiff in the case as well as appellant before the First Circuit Court. Defendants in the District Court were Carlos Lpez-

Feliciano, Aida M. Vélez, José A. Rodríguez, Lt. Cajigas Franqui, Sgt. Efraín González-Vera, Edgar Rivera Ramos, Rafael Coln-Pizarro, Angel Valentín Corali, Luis Vélez Rentas and Harold Ortiz. Of these, only Coln-Pizarro, Vélez-Rentas and Trinidad remained as appellees remained before the First Circuit Court of Appeals. Pursuant to Rule 29.1 of this Court, Petitioner has no companies nor any non-wholly owned subsidiaries.

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In the
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OCTOBER TERM, 1995

WILFREDO MARTINEZ-RODRIGUEZ, an individual

Petitioner,

v.

RAFAEL COLON-PIZARRO, JUAN TRINIDAD-MARRERO AND LUIS ANTONIO VELEZ-RENTAS, individuals

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Wilfredo Martínez-Rodríguez hereby petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the First Circuit.

OPINIONS AND ORDERS BELOW

1. The opinion of the United States Court of Appeals for the First Circuit, dated May 31, 1995, is published at 54 F.3d 980 (1st Cir. 1995) and is reproduced at Appendix A.

2. The opinion of the United States District Court for the District of Puerto Rico approving the Magistrates' Report and Recommendation, dated November 9, 1993, is reproduced at Appendix B.

3. The United States Magistrate-Judge's Report and Recommendation, dated May 11, 1993, is reproduced at Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was issued on May 31, 1995. A timely motion for Rehearing was filed and on June 20, 1995 the Circuit Court denied same. This Court has jurisdiction pursuant to 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in its pertinent part, states that "[n]o person shall be . . . deprived of his life, liberty, or property, without due process of law. . . " The Fourteenth Amendment to the United States Constitution provides, in its pertinent part: "[N]or shall any state deprive any person life, liberty or property without due process of law; nor deny any person within its jurisdiction equal protection under the laws."

Section 1003 of title 25 of the Laws of Puerto Rico Annotated states as follows:

A civil organization of public order which shall be known as the "Puerto Rico Police" is hereby created in the Com-

monwealth of Puerto Rico. It shall be its duty to protect persons and property, to maintain and keep the public order, to observe and secure the utmost protection of the civil rights of the citizens, to prevent, discover and persecute crime and within the scope of its attributes, enforce obedience to the laws and municipal ordinances and regulations promulgated thereunder.

STATEMENT OF THE CASE

The relevant facts of this case appear on the first part of the Circuit Court's opinion, at pages 982-983. Petitioner Wilfredo Martínez was a young policeman assigned to the Loíza street precinct in Puerto Rico. Upon his arrival to the station before he was to begin his shift, officer Angel Valentín Corrali (Valentín) accosted him, drew his service revolver and pointed it at Martínez's stomach and asked if he was afraid. Valentín then holstered his weapon and Martínez changed into uniform.

Sometime later, Valentín again took out his revolver and pointed it to Martínez's genitals, cocking the hammer, threatened to blow away his penis and asked if he was afraid. Valentín reholstered and Martínez moved away. Minutes later, Valentín cocked his revolver shoved it into Martínez's pants and continued his illegal actions. The revolver accidentally detonated, injuring Martinez's penis. The incidents occurred in the police station before between eight to twelve policemen witnessed the incident and did nothing to stop Valentín's actions although they were highly illegal.

PROCEEDINGS BELOW

On May 22, 1989, petitioner filed a civil rights action pursuant to 42 U.S.C. § 1983. It was alleged that officer Valentín was acting under color of state law and that the officers that stood around and did nothing violated their duty to defend a person who was being a victim of a crime[1].

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1 The proceedings in District Court are summarized at page 983 of the Circuit Court's opinion.

After several motions to dismiss and their respective oppositions were filed, the Honorable Magistrate issued a Report and Recommendation that the complaint be dismissed for Valentín's actions were not done pursuant to state law and the due process law did not protect persons from violence by private citizens based on this Court's ruling on DeShaney v. Winnebago Dept. of Social Services, 489 U.S. 189 (1989). After petitioner filed an objection to the Magistrate's Report and Recommendation, the Honorable District Court approved it and dismissed the complaint.

Petitioner filed a timely appeal to the United States Court of Appeals for the First Circuit arguing again that Valentín's actions were made pursuant to state law and that the officers that witnessed his actions failed to protect him in violation of his constitutionally protected rights.

The Circuit Court, with a dissent by Justice Bownes, decided that Valentín's actions were not made pursuant to state law, that Board of Regents of State College v. Roth, 408 U.S. 564 (1972) was not applicable for it only dealt with procedural due process and petitioner failed to specifically use as a mantra the words "substantive due process." It also dismissed the equal protection argument erroneously finding that it was waived[2]. A timely motion for rehearing under Rule 40 of the Federal Rules of Appellate Procedure was filed and denied on June 20, 1995.

REASONS FOR GRANTING THE WRIT

I. This Case Involves an Important Constitutional Question That Should be Resolved by this Court-Whether DeShaney v. Winnebago Dept. of Social Services, 489 U.S. 189 (1989) precludes substantive due process action based on an entitlement created by state law and violated by state actors.

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2 Petitioner did not specifically present the question of whether the Circuit Court erred in finding that the failure to specifically spell out the words substantive due process and that it waived the equal protection argument. Inasmuch as the resolution of these points of law are predicate to an intelligent resolution of the questions presented, they will be briefly addressed, see Cuyler v. Sullivan, 446 U.S. 335, 342 N.6. (1980)

In the instant case, petitioner believes there is no conflict amongst the Circuits on this point. The point of law, however, is an important one. The Circuit Court's finding is clearly erroneous and has the potential of creating great injustice for the due process clause of the Constitution is not the only fountain of protected rights.

In DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) this Honorable Court determined that the Due Process Clause of the United States Constitution does not require the state to protect a person's life against third parties not acting pursuant to state law. The Court in DeShaney, at page 195 n.2, however, stated the following:

> *Petitioners also argue that the Wisconsin child protection statutes gave Joshua an "entitlement" which would enjoy due process protection against state deprivation under our decision of Board of Regents of State College v. Roth, 408 U.S. 564 (1972). Brief for Petitioners 24-29. But this argument is made for the first time in petitioners' brief to this Court; it was not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari. We therefore decline to consider it here.*

Petitioner's reading of this decision is that DeShaney does not bar the proposition that if state law provides a right to protection, the failure to provide this protection when the illegal action was committed in front of policemen's faces can be a constitutional tort. It is a well known tenet of law that an action that rises to the level of conscience-shocking can constitute a violation of the due process clause of the Fourteenth Amendment. See, Rochin v. California, 342 U.S. 165, 172 (1952), Harrington v. Almy, 977 F.2d 37, 43 (1st Cir. 1992) and Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991). Recently, this doctrine was reiterated in Souza v. Pina, 53 F.3d 423 (1st Cir. 1995).

Petitioner proposes that nothing can be more shocking to the conscience than having police officers present in the commission of a crime, inside a police precinct and failing to stop the aggression. Contrary to jurisprudence cited by the Circuit Court's majority, this is not the case were the illegal action happened so fast there was no time to intervene. Here, the illegal action occurred three (3) times before the fated shot was fired.

The Circuit Court opinion states that the case of Board of Regents v. Roth, 408 U.S. 564 (1972) is not applicable to the case at hand. The doctrine of Roth alluded to by appellant is that entitlement rights are created by state law. That is precisely what we have here. Those rights provided by state law are entitled, under certain circumstances, to procedural, as well as due process protection under the Fourteenth Amendment. Appellant made this argument in its first opposition to the Magistrate's Report and Recommendation.

II. This Case Involves another Important Constitutional Question That Should be Resolved by this Court-Whether state actor's failure to provide protection to a policeman being subject of an attack by a fellow officer violated his equal protection rights.

Petitioner argued that if he had been anything else but a police officer, respondents would have stopped Valentín's actions. By not doing so because of his uniform, his rights to equal protection were violated.

The Circuit Court's opinion dismissed petitioner's equal protection argument by stating that it does not "embellish it in any way."[3] The mere fact that appellant made reference to the fact that if he were a private citizen, respondents would have intervened, is an equal protection claim. As what was involved here was an omission by respondents and not a particular law, there was no need to make reference to the plethora of cases dealing with the rational relationship criteria, etc. In addition, the amended complaint in this case makes reference to the Fourth, Eighth and Fourteenth Amendments to the Constitution, as well as 42 U.S.C. § 1983.

The Circuit Court cited Ryan v. Royal Ins. Co. v. Am., 916 F.2d 731 (1st Cir. 1990); U.S. v. Zannino, 895 F.2d 1 (1st Cir.), cert. denied, 494 U.S. 1082 (1990) and Collins v. Marina-Martínez, 894 F.2d 474 (1990), in support of its contention that petitioner abandoned his equal protection claim. An analysis of these case does not support this extreme position. In Ryan v. Royal Ins. Co. v.

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3 Page 990 of the case.

Am., 916 F.2d at page 734 the Court stated:

> *In briefing the argument that Royal was liable for the consequential damages, appellant did not allude to the wrongful termination of the CGL policy. Yet, they never explain how or why the cancellation was at odds wit the applicable policy or governing law.*

Here, appellant made it clear that respondents' failure to intervene in his behalf was due to the fact that he was a police officer, something appellant did not do in Ryan. In U.S. v. Zannino, 895 F.2d 1 (1st Cir.), cert. denied, 494 U.S. 1082 (1990), appellant attempted to incorporate by reference another brief filed in a consolidated appeal. The Circuit Court decided that this was inappropriate for the cases were not identical and denied some of his arguments accordingly, a situation completely different from the one at hand. Finally, in Collins v. Marina-Martínez, 894 F.2d 474 (1990), appellant raised an issue on appeal but failed to mention it in the argument section of his brief. Clearly this is different from our case.

Moreover, the Circuit Court's distinction between private and public persons was erroneous in the context it was used. It cites as precedent Westlands Water Dist. v. Amoco Chem. Co., 953 F.2d 1109, 1113 (9th Cir. 1991) and Southern Cal. Edison Co. v. U.S., 415 F.2d 758 (9th Cir.), cert. denied, 396 U.S. 957 (1969). In the former, California law prohibited punitive damages judgments against public utilities[4]. The Ninth Circuit majority found that there was a rational relationship to a legitimate government goal and stated as follows:

> *To allow punitive damages against a public entity would punish the general public, which is the group ultimately intended to be benefited by the punishment.*

In the latter, the question was whether the government violated the equal protection clause by writing a contract where a private utility was liable for any damages to the U.S. government's property when for public utilities the contract made them liable only for negligence. This is a case dealing with economic rights, not the fundamental rights protected by substantive due process,

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4 The case there is easily distinguishable from the instant case. In Westlands a state law that made the distinction was involved whereas here is a judicially created dichotomy.

see Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) y Pacific Mutual Life Ins. Co. v. Haslip, 111 Sct. 1032 (1991). In addition, again this is dichotomy created by the government, not by the Courts like we have here. The fact that the Legislature or the Executive may create unequal distinctions does not per se give the same right to the Courts in the rendering of its opinions. Hence, the Circuit Court should not have dismissed appellants equal protection claim.

CONCLUSION

Inasmuch as the above discussion shows that the Circuit Court and the District Court were both in error, this Honorable Supreme Court should grant the certiorari requested. In the alternative, it may reverse the judgment of the Circuit Court and reinstate the complaint for a trial in the merits.

ORTIZ TORO & ORTIZ BRUNET
Attorneys for Petiotioner
P.O. Box 192064
San Juan, Puerto Rico 00919-2064
Tel. (809) 754-7698
Fax. (809) 766-1596

Jorge Ortiz Brunet

John E. Mudd

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the First Circuit

No: 94-2138

WILFREDO MARTINEZ,
a/k/a WILFREDO MARTINEZ RODRIGUEZ,
Plaintiff, Appellant
v.
RAFAEL COLON.
a/k/a RAFAEL COLON PIZARRO, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Raymond L. Acosta, U.S. District Judge]

Before
Torruella, Chief Judge,
Bownes, Senior Circuit Judge,
and Selya, Circuit Judge.

John E. Mudd, with whom Howard Charles and Ortiz Toro & Ortiz Brunet Law Offices were on brief, for appellant.
Edgardo Rodriguez-Quilichini, Assistant Solicitor General, with whom Pedro Delgado Hernandez, Solicitor General, and Carlos Lugo Fiol, Deputy Solicitor General, were on brief, for appellees.

May 31, 1995

SELYA, Circuit Judge. This appeal raises interesting question about the contours of 42 U.S.C. § 1983 (1988) and the reach of the Supreme Court's core holding in DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989). Concluding, as we do, that the court below appropriately applied DeShaney, we affirm the entry of summary judgment in the defendants' favor.

I. BACKGROUND

Consistent with the method of Fed. R. Civ. P. 56, we canvas the material facts in a light that flatters, but does not impermissibly distort, the plaintiff's claims. We then recount the travel of the case.

A. The Facts.

We outline the facts, omitting the graphic details on which our dissenting brother prefers to dwell. In our view, these details are not relevant to the legal issues posed on appeal.

In the early morning hours of May 26, 1988, plaintiff-appellant Wilfredo Martinez Rodriguez (Martinez), a youthful member of Puerto Rico's police force, drove to the Loiza Street Precinct, located in the San Juan metropolitan area. Though Martinez was not scheduled to begin his shift until 4:00 a.m., he arrived early, pursuant to local custom, in order to procure his post assignment. Martinez alleges that he was on duty from the moment he arrived - even before his shift began - because from that point forward he was subject to the shift commander's orders.

Upon Martinez's arrival, a fellow officer who was on duty at the time, Angel Valentin Corali (Valentin), approached Martinez' car and called him "pretty boy" ("papito lindo"). When Martinez alighted, Valentin drew his service revolver, pointed it at Martinez' stomach, cocked the hammer, placed his finger on the trigger, and inquired if Martinez was afraid. Valentin then disarmed the weapon, and Martinez hurried inside the station, first telling Valentin: "Don't horse around with that because you will kill me."

Shortly after this fracas had occurred, Valentin accosted Martinez in the radio room, inserted his finger into a small hole in Martinez' undershirt, and ripped it. Once again, Martinez walked away from Valentin. He then changed into his uniform, entered the

waiting room, and reported to this shift supervisor, defendant-appellee Juan Trinidad Marrero (Trinidad).

Soon thereafter, Valentin reappeared, pointed his revolver at Martinez' genitals, cocked the hammer, and, with his finger on the trigger, threatened to "blow away" Martinez' penis (asking him, somewhat rhetorically, if he was scared). When Valentin lowered the weapon, Martinez immediately moved away from him. Within minutes Valentin again approached Martinez, cocked the revolver, aimed it at Martinez' groin, and resumed his taunting. The revolver accidentally discharged, maiming Martinez.

The first encounter took place in the precinct's parking lot and the rest transpired inside the police station. According to Martinez, roughly twenty minutes elapsed from star to finish.

All parties agree that the shooting, which occurred before the 4:00 a.m. shift change, was unintentional.[1]

B. Travel of the Case.

On May 22, 1989, Martinez filed suit in federal district court against numerous defendants, including, as relevant here, Rafael Colon Pizarro (Colon), Luis A. Velez Rentas (Velez), and Trinidad (collectively, "the officers" or "the defendants").[2]

Invoking 42 U.S.C. § 1983 and premising jurisdiction on the existence of a federal question, see 28 U.S.C. § 1331 (1988), he alleged that his rights had been abridged in that each defendant owed him a duty to intervene and protect him from readily discernible farm at the hands of a fellow officer, but each defendant breached this duty by subsequent inaction.[3] Martinez asserted

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[1] In his memorandum of law in support of his opposition to defendant Carlos Lopez Feliciano's motion to dismiss, Martinez stated that "the revolver apparently fired by accident." Record Appendix at 21. At nay rate, the summary judgment record contains no facts that would support a contrary finding; and, for aught that appears, Martinez has never asserted that Valentin shot him intentionally.

[2] Plaintiff asserted claims against several other defendants, including Valentin and Lopez Feliciano. Those claims are not before us, and we ignore them for purposes of this opinion.

[3] Although the underlying facts are hotly contested, we assume for purposes of this appeal, as Martinez would have it, that all three defendants witnessed the entire progression of events and had a meaningful opportunity to intervene at each step along the way.

pendent tort claims with respect to all three defendants and, with respect to Trinidad, asserted a section 1983 claim based on supervisory liability.

After a flurry of pretrial discovery, the officers moved for summary judgment. They argued, inter alia, that Valentin was not acting under color of state law when the mishap occurred; and that, therefore, onlooker officers did not have a constitutional duty to intervene on Martinez' behalf. The district court referred the motions and Martinez' timely opposition to a magistrate judge. The magistrate concluded that, under DeShaney, the officers had no constitutional obligation to protect Martinez from Valentin's actions, and urged the district court to grant summary judgment. The plaintiff objected to the magistrate's report and recommendation, but the district court, affording de novo review, see Fed. R. Civ. P. 72(b), adopted the report, accepted the recommendation, and entered judgment accordingly. This appeal followed.

II. THE SUMMARY JUDGMENT STANDARD

A district court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of la." Fed. R. Civ. P. 56(c). We have charged the boundaries of this rule in case after case, see, e.g., Coyne v. Taber Partners I, ____ F. 3d ____ (1st Cir. (1985) [No. 94-2231, slip op. at 4-5]; National Amusements, Inc. v. Town of Dedham, 43 F. 3d 731, 735 (1st Cir. 1995), petition for cert. filed, 63 U.S.L. W. 3736 (U.S. Apr. 4, 1995) (No. 94-1630; Vasapolli v. Rostoff, 39 F. 3d 27, 32 (1st Cir. 1994); Dow v. United Bhd. of Carpenters, 1 F. 3d 56, 58 (1st Cir. 1983); Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993); Wynne v. Tufts Univ. Sch. of Med., 976 F.2d. 791, 793-94 (1st Cir. 1992), cert. denied, 113 S. Ct. 1845 (19993; United States v. One Parcel of Real Property (Great Harbor Neck, New Shoreham, R.I.), 960 F.2d 200, 204 (1st Cir. 1992); Rivera-Muriente v. Agosto-Alicea, 959 F.2d. 349, 351-52 (2st. Cir. 1992); Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 7-8 (1st Cir. 1990); Garside v. Osco Drug, Inc., 895 F.2d 46, 48-49 (1st. Cir. 1990); Brennan v. Hendrigan, 888 F.2d 189, 191-92 (1st Cir. 1989), and it would serve no useful purpose to draw that map anew.

For present purposes, we need say no more than that summary judgment will lie if the records, even when taken in the aspect most favorable to the nonmovant, see Rivera-Muriente, 959 F.2d at 352, fails to yield a trialworthy issue as to some material fact. In applying this principle, it is important to bear in mind that not every genuine factual conflict necessitates a trial. It is only when a disputed fact has the potencial to change the outcome of the suit under the governing law if found favorable to the nonmovant that the materiality hurdle is cleared. See One Parcel, 960 F.2d at 204. Here, the record reflects a veritable salmagundi of bitterly disputed facts - but none that is material.

To that extent, then, our task is simplified. Exercising de novo review, see Pagano, 983 F.2d at 347, and adopting the plaintiff's version of all controverted facts (but not, however, giving credence to "conclusory allegations, improbable inferences, [or] unsupported speculation," Medina-Muñoz, 896 F.2d at 8), we conclude that the court did not err in jettisoning the section 1983 claims.

III. ANALYSIS

There are two essential elements of an action under section 1983: "(i) that the conduct complained of has been committed under color of state law, and (ii) that this conduct worked a denial of rights secured by the Constitution or laws of the United States." Chongris v. Board of Appeals, 811 F.2d 36, 40 (1st Cir.), cert. denied, 483 U.S. 1021 (1987); accord West v. Atkins, 487, U.S. 42, 48 (1988); Daniels v. Williams, 474 U.S. 327, 330-31 (1986). Of course, the reference to "state law" cannot be taken literally, for Puerto Rico enjoys the functional equivalent of statehood in regard to section 1983 and, thus, state law includes Puerto Rico law. See Playboy Enters., Inc. v. Public Serv. Comm'n of P.R., 906 F.2d 25, 31 n.8 (1st Cir.), cert. denied, 498 U.S. 959 (1990); Berrios v. Inter Am. Univ., 535 F.2d 1330, 1331 n.3 (1st. Cir.), appeal dismissed, 426 U.S. 942 (1976).

For purposes of this appeal, the defendants do not contest the plaintiff's allegation that, at all relevant times, the defendants were on duty and acting under color of state law. This concession reduces our inquiry to whether the facts, taken most congenially to the plaintiffs, can support a finding that the defendants violated a right secured to the plaintiff either by the Constitution or by federal

law. Since the plaintiff has not alleged the transgression of any right secured to him under a federal statute, we may narrow the inquiry still further, limiting it to whether the facts show a violation of a constitutional right. It is to this elusive question that we next proceed.

A. The Duty of Intervene

Plaintiff pins his hopes principally on a claim that the defendants' failure to protect him from the imminent peril posed by Valentin abridged his right to substantive due process. The touchstone of the law in this are is the Supreme Court's opinion in DeShaney. There, a child sued for damages under 42 U.S.C. § 1983, claiming that employees of a state-run social service agency, on notice of a parent's abusive behavior, nonetheless failed to protect the child from the readily foreseeable danger. See DeShaney, 489 U.S. at 193. The Court affirmed the entry of summary judgment in defendants' favor. Chief Justice Rehnquist, writing for the majority, explained that the Due process Clause ordinarily does not require the state to protect and individual's life, limb, or property against the marauding of third parties not acting to the state's behoof. See id. at 196. Consequently, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Id. at 197.

Although the DeShaney Court left open the possibility of certain circumscribed exceptions to the general rule of nonliability, Martinez makes no effort to slide within them. He does not argue that he was in the custody of the state, see id. at 198-200 (discussing right to protection arising in favor of incarcerated prisoners and involuntarily committed mental patients), or that he was in its "functional custody," see id. at 201 n. 9 (discussing possible existence of situations analogous to incarceration or institutionalization), or that the state made him more vulnerable to Valentin's actions, see id. at 201. Rather, Martinez contends that DeShaney is altogether inapposite.

To the extend that this contention is based simply and solely on the fact that, unlike in DeShaney, the defendants here are police officers, not social workers, we reject it. Of course, police officers sometimes have an affirmative duty to intervene that is enforceable under the Due Process Clause. For example, "[a]n officer

who is present at the scene [of an arrest] and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under section 1983 for his nonfeasance," provided that he had a "realistic opportunity" to prevent the other officer's actions. Gaudreault v. Municipality of Salem, 923 F.2d 203, 207 n.3 (1st. Cir. 1990), cert. denied, 500 U.S. 956 (1961); accord O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir. 1988). But this line of cases does not, as plaintiff importunes, carve out an exception to the DeShaney rule. Instead, such cases escape the rule because the aggressor is actin under color of his public office.

Gaudreault illustrates the point. The quoted statement specifically contemplates that the underlying tortious conduct take place within the context of an arrest, interrogation, or similar maneuver, see Gaudreault, 923 F.2d at 206-07 & n.3, in which a differential exists between the victim and the officer precisely because of the latter's status as one empowered to enforce the law, coercively if necessary, against the former. Similarly, O'Neill involved the beating of a handcuffed man by law enforcement officers during an interrogation in the detention area of a police station. See O'Neill, 839 F.2d at 10. We cannot imagine a more paradigmatic exercise of state authority than the processes of handcuffing, detaining, and interrogating a citizen. Gaudreault and O'Neill, then, are cases in which the aggressor is acting under color of state law. The DeShaney rule - which addresses the "State's failure to protect an individual against private violence," DeShaney, 489 U.S. at 197 (emphasis supplied) - is not implicated in such cases because the violence in question is not private but "public, " i.e., attributable to state action.[4]

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[4] A constitutional duty to intervene may also arise if onlooker officers are instrumental in assisting the actual attacker to place the victim in a vulnerable position. See, e.g., Byrd v. Brishke, 466 F.2d 6, 9-11 (7th Cir. 1972); cf. DeShaney, 489 U.S. at 201 (recognizing a possible affirmative constitutional duty to protect against certain dangers if the state takes "part in their creation" or does something "to render [the victim] more vulnerable to them"). In such a scenario, the onlooker officers and the aggressor officer are essentially joint tortfeasors and, therefore, may incur shared constitutional responsibility. See generally Monroe v. Pape, 365 U.S. 167, 187 (1961) (advising courts to read section 1983 against the backdrop of historial tort liability). Because there is no indication of any such joint enterprise here, we have no occasion to explore the viability of the theory.

Private violence - even private violence engaged in by one who happens to work for the state - has different legal ramifications than violence attributable to state action. See, e.g., Hughes v. Halifax County Sch. Bd., 855 F.2d 183, 186-87 (4th Cir. 1988) (distinguishing private actions of county maintenance workers from cases in which "the actions complained of were committed while the defendants were purporting to act under the authority vested in them by the state, or were otherwise made possible because of the privileges of their employment"), cert. denied, 488 U.S. 1042 (1989).

Thus we recently held, in light of DeShaney, that a district attorney's office had no constitutional obligation to protect a citizen against self-inflicted private violence (there, noncustodial suicide) alleged to have been caused by the state's implication of him in a multiple murder case. See Souza v. Pina, ___ F.3d ___, ___ (1st. Cir. 1995) [No. 94-2079, slip op. at 9-11].

Interpreting DeShaney to say that the state has no generalized duty to protect its citizens from violence except when it sets the stage by acting affirmatively (as in a custodial setting), see id. at ___ [slip op. at 9], we concluded that, although the state's acts may have "rendered [the decedent] more vulnerable to danger in the sense that those acts may have exacerbated - or even brought about - [the decedent's] suicidal tendencies . . . these are not the kind of 'affirmative acts' by the state that would give rise to a constitutional duty to protect." Id. at ___ [slip op. at 10] (citing Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 992-93 (1st Cir. 1992)).

Translated to the police milieu, these cases mean that when an on-duty police officer witnesses violence, the existence vel non of a constitutional duty to intervene will most often hinge on whether he is witnessing private violence or violence attributable to state action. It remains to be seen how and where the line that separates one form the other should be drawn.

B. Private Action.

In attempting to distinguish private violence from violence attributable to state action for purposes of applying the DeShaney rule, courts must beware simplistic solutions. To be sure, violence is attributable to state action if the perpetrator is acting under color

of state law, see, e.g.., Earnest v. Lowentritt, 690 F.2d 1198, 1200 (5th Cir. 1982) ("Section 1983 does not reach all constitutional injuries, but only those caused by persons acting 'under color of state law.'"), but that is a virtual tautology. Furthermore, the construct - "acting under color of state law" - rarely depends on any single, easily determinable fact, such as a policeman's garb, see e.g., Stengel v. Belcher, 522 2d 438, 441 (6th Cir. 1975) (explaining that whether a police officer is " in or out of uniform is not controlling"), cert. dismissed, 429 U.S. 118 (1976), duty status, see e.g., Pitchell v. Callan, 13 F.3d 545, 548 (2d Cir. 1994) (explaining that "whether an officer was on or off duty when the challenged incident occurred" is not dispositive): Stengel, 522 F. 2d at 551 (same), or whereabouts, see, e.g., Delcambre v. Delcambre, 635 F 2d 407, 408 (5th Cir. 1981) (per curiam) (holding that a police chief's assault on a private citizen was not conduct under color of law even though it occurred at police headquarters). Nor does "acting under color of state law" depend on whether an officer stays strictly within the line of duty, or oversteps it. See Monroe v. Pape, 365 U.S. 167, 172 (1961); Screws v. United States, 325 U.S. 91, 111 (1945)' For instance, a police officer who exercises, but misuses or exceeds, his lawfully possessed authority is generally thought to be acting under color of law. See, e.g., Gibson v. City of Chicago, 910 F2d. 1510. 1518 (7th Cir. 1990).

The point is that segregating private action from state action calls for a more sophisticated analysis. In general, section 1983 is not implicated unless a state actor's conduct occurs in the course of performing ac actual or apparent duty of his office, or unless the conduct is such that the action could not have behaved in that way but for the authority of his office. Thus, whether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties. See Pickrel v. City of Springfield, 45 F.3d 1115, 1118 (7th Cir. 1995); Anthony v. County of Sacramento, 845 F. Supp. 1396, 1400 (E.D. Cal. 1994).

We think this focus follows inexorably from West, where the Court wrote that "[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West, 487 U.S. at 49 (quoting United States, v. Classic, 313 U.S. 299,

326 (1941)). Hence, a person acts under color of state law "when he abuses the position given to him by the State." Id. at 50. The key determined is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law. See id.

Logically, then, not every action undertaken by a person who happens to be a police officer is attributable to the state. Though "under 'color' of law means under 'pretense' of law, "even so, the acts of state officials "in the ambit of their personal pursuits" are not state action. Screws, 325 U.S. at 111; see also Gibson, 910 F.2d at 1518. Accordingly, a policeman's private conduct, outside the line of duty and unaided by any indicia of actual or ostensible state authority, is not conduct occurring under color of state law. See Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1984); United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991), cert. denied, 112 S. Ct. 1960 (1992); Dang Vang v. Vang Xiong X. Toyed, 944 F.2d. 476, 479 (9th Cir. 1991); Murphy v. Chicago Transit Auth., 638 F. Supp. 454, 467 (N.D. Ill. 1986); Johnson v. Hackett, 284 F. Supp. 933, 937 (E.D. Pa. 1968). Even though "acting under color of law" included "acting under pretense of law" for purposes of a state action analysis, there can be no pretense if the challenged conduct is not related in some meaningful way either to the officer's governmental status or to the performance of his duties.

C. Separating Wheat from Chaff.

Explicating the standard for segregating private action from action attributable to the states does not complete our task. Since the private conduct of police officers does not constitute action attributable to the state and, therefore, does not give rise to section 1983 liability under DeShaney or otherwise, we must determine whether Valentin, at the time and place in question, was engaged in purely personal pursuits or, conversely, whether he was action under color of state law. To do so, we must assess the nature of this conduct in light of the totality of surrounding circumstances. See Pitchell, 13 F. 3d at 548; Revene v. Charles County Comm'rs, 882 F. 2d 870, 872-73 (4th Cir. 1989); Traver v. Meshriy, 627 F. 2d. 934, 938 (9th Cir. 1980).

Here, the record is transpicuously clear that throughout the course of Martinez' any power (real or pretended) possessed by

virtue of state law. to the contrary, Valentin was bent on a singularly personal frolic: tormenting an acquaintance.[5] Though on duty and in uniform, Valentin's status as a police officer simply did not enter into h is benighted harassment of his fellow officer. Hazing of his sort, though reprehensible, is not action under color or pretense of law.

Nor can it be said that Valentin's action were in any meaningful way related either to this official status or to the performance of his police duties. In this regard, the case bears a resemblance to Delcambre. There, the Fifth Circuit ruled that the plaintiff, who had been assaulted on the premises of the municipal police station by her brother-in-law, the police chief, had no cognizable claim under 42 U.S.C. § 1983. See Delcambre, 635 F.2d at 408. The assault arose out of a family squabble, and the court found that the police chief, though on duty, "was not acting under color of law as required for liability under [section 1983]." Id.

To be sure, Valentin shot Martinez with this service revolver, and in that sense it might be argued that the shooting was made possible by Valentin's status as a police officer. See Cassady v. Tackett, 938 F.2d 693, 695 (6th Cir. 1991) (concluding that, in "allegedly flourishing and threatening to use his gun" against a coworker, the defendant acted under color of state law because "had authority or power to carry the gun in the jail only because he was [the county's] elected jailer"). This argument succumbs for a very basic reason: plaintiff did not proffer it either in the district court or in his appellate brief. The argument is, therefore, not properly before us. See United States, v. Slade, 980 F.2d. 27, 30 n.3 (1st. Cir. 1992) (stating that theories not briefed on appeal are waived); Teamsters, Chauffeurs, Warehousemen & Helpers Union v. Superline Transp. Co., 953 F.2d. 17, 21 (1st. Cir. 1992) ("If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.").

Even if the argument were properly before us, we would not embrace it. We do not think it is reasonable to hold that every use of a policeman's gun, even in the course of purely personal pur-

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[5] To use the plaintiffs, spoken characterization, Valentin was "hors[ing] around; or, as plaintiff put in his second amended complaint, "playing 'Russian roulette' with another man's genitalia."

suits, created a cause of action under section 1983. Instead, we are of the view that the context in which a service revolver is used, not just the mere fact of its use, must be consulted to determine the constitutional relevance of the officers' conduct. See Payne v. Government of D.C., 559 F2d. 809, 825 n.9 (D.C. Cir, 1977). Consequently "[w]hile a police officer's use of a state-issue weapon in the pursuit of private activities will have 'furthered' the § 1983 violation in a literal sense," a court needs "additional indicia of state authority to conclude that the officer acted under color of state law." Barna, 42 F. 3d at 817-18 (holding that "unauthorized use of a police-issue nightstick is simply not enough to color [a] clearly personal family dispute with the imprimatur of state authority").

Here, plaintiff has not produced any avidence tending to show that his tormentor, when brandishing the firearms, was exercising or purporting to exercise police power.[6] In the absence of any additional indicia of state action, we believe that the unauthorized use of a government-issue weapon is too attenuated a link to hold together a section 1983 claim. See Barna, 42 F.3d at 818-19; Payne, 559 F.2d at 825 n.9; see also Bonsignore v City of N.Y., 683 F.2d. 635, 638-39 (2d Cir. 1982) (holding that a police officer who wounded his wife and killed himself using a gun which he was authorized to carry because of his status as an officer "was not acting under color of state law since his actions were not 'commit-

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[6] Had Martinez been a civilian rather than a fellow officer, the significance of Valentin's uniform and weapon for purposes of the color-of-law determination might well have been greater. See, e.g., Jones v. Gutschenritter, 909 F2d. 1208, 1212-13 (8th Cir, 1990) (observing that the presence of a uniformed and armed police officer may reasonably cause a civilian to refrain from taking action to protect his rights). But when the victim is himself a fellow officer and the particular interaction between the two officers is of a distinctively personal nature, it can generally be assumed that the aggressor's official trappings, without more, will not lead the victim to believe that the aggressor is acting with the imprimatur of the state and, in turn, to forgo, exercising his legal rights. The facts in this case are congruent with this hypotesis. The campaign of terror that Valentin mounted was patently personal in nature, and Martinez unquestionably realized as much; indeed, there was not the slightest indication that Valentin's conduct was undertaken pursuant to the authority of his office. Plainly, the fact that Martinez walked away numerous times shows that he was not "so intimidated" by Valentin's status as a policeman "as to cause him to refrain from exercising his legal right[s]." Id at 1212.

ted in the performance of any actual or pretended duty,' but were performed 'in the ambit of [his] personal pursuits'") (quoting Screws 325 U.S. at 111; Johnson, 284 F. Supp. at 937.

We add an eschatocol of sorts. Even if a constitutional duty to intervene conceivably could be dragooned from these facts, then, in that event the location of his case in the penumbra of DeShaney, dictates that the defendants nonetheless would enjoy qualified immunity and, since appellant's suit only seeks money damages, the defendants would be entitled to an affirmance on this alternative ground. See, e.g., Garside, 895 F.2d at 48-49 (explaining that a grant of summary judgment can be affirmed on any independently sufficient ground made manifest in the record). We elaborate below.

"In analyzing a claim of qualified immunity, . . . we are concerned with clearly established constitutional or statutory rights of which a reasonable officer would have known at the time he took action." Crooker v. Metallo, 5 F. 3d 583, 584 (1st Cir. 1993) (emphasis supplied). When used in this context, the phrase " "clearly established" has a well-defined meaning. It denotes that at the time the challenged conduct occurred the contours of the right were sufficiently plain that a reasonably prudent state actor would have realized not merely that his conduct might be wrong, but that it violated a particular constitutional right. See Anderson v. Creigton, 483 U.S. 635, 640 (1987); Buenrostro v. Collazo, 973 F.2d. 39, 42 (1st Cir. 1992). The inquiry into the nature of a constitutional right for the purpose of ascertaining clear establishment seeks to discover whether the right was reasonably well settled at the time of the challenged conduct and whether the manner in which the right related to the conduct was apparent. See Wallow v. Doory, 14 F.3d 993, 995 (4th Cir. 1994) (Powell, J., sitting by designation). In mounting this inquiry, courts may neither require that state actors faultlessly anticipate the future trajectory of the law, see Crooker, 5 F.3d at 585 (noting that a state actor is not "expected to carry a crystal ball"), nor permit claims of qualified immunity to turn on the eventual outcome of a hitherto problematic constitutional analysis, see, e.g., Collins v. Marina-Martinez, 894 F.2d 474, 478 (1st Cir. 1990) (recognizing that "a plaintiff who is entitled to prevail on the merits is not necessarily entitled to prevail on the issue of qualified immunity"); accord

Amsden v. Moran, 904 F.2d. 748, 751-52 (1st Cir. 1990 (citing other cases), cert. denied, 498 U.S. 1041 (1991).

Here, there can be no doubt that, at the moment the maiming of Martínez materialized, legitimate questions abounded as to whether the conduct at issue violated Martínez' constitutional rights. After all, DeShaney had not yet been decided; thus, the whole question of a constitutional duty to intervene was cloaked in uncertainty. Even now, with the guidance furnished by the DeShaney Court, the precise contours of the rule as it applies to onlooker officers are murky. Consequently, even if Martinez had some basis for a claim that the defendants owed him a duty grounded in the Constitution, the dimensions of the right were dimly perceived (if perceived at all). It follows inexorably that the defendants would be entitled to qualified immunity and, hence, entitled to brevis deposition.

D. Other Theories.

In addition to his principal due process claim, Martinez advances several other theories. All are unavailing. We mention three of them (rejecting the remainder without further elaboration).

1. **Violation of Local Law.** Martinez urges that the defendants' breach of a provision of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 25, § 1003 (1980),[7] furnishes a basis for liability under 42 U.S.C. § 1983. He is wrong.
   It is established beyond peradventure that a state actor's failure to observe a duty imposed by state law, standing alone, is not sufficient foundation on which to erect a section 1983 claim. See, e.g., Amsden, 904 F. 2d at 757; Chongris, 811 F.2d at 42-443. Although it is true that constitutional significance may attach to certain interests crated by state law, see,

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[7] The statute provides in pertinent part that police officers have a duty

> to protect persons and property, to maintain and keep the public order, to observe and secure the utmost protection of the civil rights of the citizens, to prevent ... crime and ... enforce obedience to the laws.....
>
> P.R. Laws Ann. tit. 25, § 1003 (1980).

e.g., Chongris, 811 F.2d at 43 (recognizing that "property rights, while protected by the federal Constitution, are creatures of state law"), not every transgression of state law does double duty as a constitutional violation. The Constitution is a charter of carefully enumerated rights and responsibilities, defining the relationship between the people and a government of limited powers. Its scope and application are necessarily determined by its own terms. Though grand in its design and eloquent in its phrasing, the Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations - no matter how egregious those violations may appear within the local legal framework.[8]

Moreover, while the plaintiff states that section 1003 creates a constitutionally protected "entitlement" under Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972), he does not develop the thesis - and we do not see how Roth applies. Neither Roth's focus nor its procedural design bears any similarity to the case at hand. For one thing, the Roth Court's conception of a cognizable constitutional entitlement was limited to property interests. See id. (citing Goldberg v. Kelly, 397 U.S. 254 (1970)). We fail to intuit how Roth supports the plaintiff's claim that he had an entitlement, pursuant to section 1003, to be protected in his physical person. For another thing, the remedial framework contemplated by Roth - procedural due process, principally in the form of notice and a hearing, see id. at 577 - has no applicability at all to Martinez' remonstrance. Whatever other uncertainties may plague this case, it is clear that Martinez is claiming a substantive due process violation, not a procedural due process violation. See, e.g., Amsden, 904 F.2d at 753-54 (delineating differences).

In sum, Roth is a round hole, and Martinez' square peg of a case does not fit within it.

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[8] The absence of a constitutional duty to intervene in no way detracts from the callous nature of the conduct attributed to the officers in this case, nor does it imply that onlooker officers confronted by private violence may not have a state law duty to intervene. That question, quite simply, lies beyond the borders of this opinion.

2. Equal Protection. The plaintiff makes the bold assertion that he was denied rights secured to him under the Equal Protection Clause because, were he a private citizen, the defendants would almost certainly have come to his rescue. He does not embellish this ipse dixit in any way.[9] Consequently, it does not assist his cause. "It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned." Ryan v. Royal Ins. Co. of Am., 916 F. 2d 731, 734 (1st Cir. 1990); accord United States v. Zannino, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990); Collins v. Marina-Martinez, 894 F.2d 474, 481 n.9 (1st Cir. 1990). So it is here: the plaintiff's fleeting reference to equal protection does not succeed in preserving the issue for review.[10]

3. Supervisory Liability. Finally, the plaintiff maintains that Trinidad, if not liable under section 1983 as an onlooker officer, may be held liable qua shift supervisor for Valentin's acts. "Supervisory liability attaches only if a plaintiff can

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[9] This criticism rests neither on the economy of Martinez' asseveration nor on its potential incoherence, but, rather, on the utter lack of any legal foundation provided for the claim; Martinez makes reference to no constitutional provision, no statute, no case law, no treatise, not even a law review article. Parties to legal controversies must do more than allege unsupported facts to survive summary judgment; they must at the very least explain the basis for, and the legal significance of, those facts.

[10] To the extent that our dissenting colleague proposes that the defendants' nonintervention cannot be deemed rational, see post at pp. 30-31, this is merely another way of disagreeing with our conclusion that Valentin's conduct was private, not public. As for the larger issue of drawing distinctions between the private and the public, we note simply that such distinctions are regularly and validly drawn by courts and legislatures alike. See, e.g., Westlands Water Dist. v. Amoco Chem. Co., 953 F. 2d 1109, 1113 (9th Cir. 1991) (finding a rational basis for distinguishing between public and private tortfeasors in regard to recovery of punitive damages); Southern Cal. Edison Co. v. United States, 415 F.2d 758, 760 (9th Cir.) (noting that "under the equal protection clause the separate classification of privately and publicly owned utilities has long been held justifiable"), cert. denied, 396 U.S. 957 (1969). It is this very distinction - public versus private - that undergirds not only DeShaney but also the Bill of Rights itself.

demonstrate by material of evidentiary quality an affirmative link between the supervisor's conduct and the underlying section 1983 violation." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 583 (1st Cir. 1994); see also Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 92 (1st Cir. 1994); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir. 1989). Because no underlying constitutional violation in fact occurred, see supra Part III (C), no supervisory liability can be attributed to Trinidad under section 1983.[11]

IV. CONCLUSION

We need go no further. Because the defendants' failure to intervene and protect the plaintiff against Valentin's private actions, though regrettable, cannot be said to have violated rights secured to the plaintiff by the United States Constitution, see DeShaney, 489 U.s. at 196-97, the district court did not err in summarily disposing of the federal claims. And, once the court determined so far in advance of trial that no legitimate federal question existed, the jurisdictional basis for plaintiff's pendent claims under Puerto Rico law evaporated. See Brennan, 888 F.2d at 196. Thus, the court properly dismissed the balance of the complaint.[12]

Affirmed.

- Dissent follows -

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[11] Moreover, Trinidad was not the supervisor on Valentin's shift (during which Martinez was shot), but, rather, on the subsequent 4:00 a.m. to 12 noon shift. Thus, it is far from clear that supervisory liability would be a viable theory vis-a-vis Trinidad even if an underlying constitutional violation could be shown.

[12] Of course, the dismissal operates without prejudice to whatever rights plaintiff may have to prosecute the pendent claims in the courts of Puerto Rico. See Feinstein v. RTC, 942 F.2d 34, 47 (1st Cir. 1991).

BOWNES, Senior Circuit Judge, dissenting. For the reasons that follow, I cannot join the majority opinion. I start with the facts. Although the majority's factual recitation is not inaccurate, it is not a full-bodied portrayal of what happened.

I. Plaintiff, Martinez, was a young (age twenty) and comparatively new member of the Puerto Rico Police Force. On the day of the events giving rise to this case, he arrived at the police station sufficiently early to be given his duty assignment. Martinez parked his car in the police parking lot. He got out of his car and started towards the police station to get his orders for the day. There were four other police officers in the lot: the defendants — Colón, Vélez and Trinidad — and Valentin, who is not a defendant. As the majority acknowledges, the defendants were, at all relevant times, on duty as police officers and acting under color of state law. The three defendants observed the events that took place in the parking lot and the police station and heard Valentin's denigrating remarks to Martinez. None of the defendants asked Valentin to stop his verbal and physical assaults against Martinez. To put it starkly, they stood by and watched without protest Valentin "blow away" Martinez's penis.

As Martinez walked across the parking lot, Valentin said to the defendants, "Here comes Pretty Boy." Valentin then accosted Martinez, drew his service revolver, pointed it directly at Martinez's genital area, cocked it, put his finger on the trigger, asked Martínez if he was afraid, and then lowered the revolver. Martinez told Valentin: "Don't horse around with that because you will kill me." Martinez then proceeded into the station house. A short time later Valentin again confronted Martinez; this time he pushed his finger through a hole in Martinez's undershirt and ripped the shirt open. The record does not disclose whether any words were spoken at this juncture. Martinez put his police uniform on and reported to his shift supervisor, defendant Trinidad.

A short time later Valentin again assaulted Martinez. This assault was similar to the first confrontation, but with an ominous threat. This time Valentin pushed the muzzle of his loaded and cocked revolver into the front of Martinez's pants and threatened to "blow away" Martinez's penis. Valentin then asked Martinez if he was scared. After Valentin withdrew the weapon, Martinez moved away from him.

A short time later, within minutes, Valentin again accosted Martinez. He loaded and cocked his revolver and then inserted it into the front of Martinez's pants while continuing to verbally abuse him. The charade ended when Valentin's revolver discharged. Valentin's prior threat became a reality; Martinez's penis was in fact blown away and he was rendered permanently impotent.

The majority calls the shooting accidental and says, "All parties agree that the shooting . . . was unintentional." Ante at 4. Whether the shooting was accidental or not, it can be concluded, based on Valentin's words and actions, that it was an accident that was bound to happen. What Valentin did makes Russian roulette seem like a parlor game.

II. The majority's central holding is premised on a ruling that Valentin was not acting under color of state law. In my view, the facts taken in the light most favorable to plaintiff establish that Valentin was acting under color of state law.

As the majority points out: "[T]he traditional definition of acting under color of state law requires that the defendant have exercised poser possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state.'" Ante at 13 (quoting West v. Atkins, 487 U.S. 42, 49 (1988)) (ellipses and internal quotation marks omitted). Simply stated, "a person acts under color of state law 'when he abuses the position given him by the State.'" Id. (quoting West, 487 U. S. at 50). I think that Valentin exercised power possessed by virtue of Puerto Rico law and made possible only because he was clothed with the authority of Puerto Rico, and that he abused that power.

Even if I disregard the obvious — that Valentin was in uniform, on duty, in the police station, and used his service revolver to commit the tort (all of which militate heavily in favor of a finding that Valentin abused his position as a police officer) — I believe that Valentins's status as a police officer was the only reason the defendants took no action. If Valentin had been a private citizen and had been tormenting Martinez in the same manner, the bystander officers certainly would have intervened. The record gives rise to a reasonable inference that Valentin's police-officer status led the bystander officers to

conclude that: (1) Valentin was not mentally unbalanced to the point that he might actually shoot Martinez, but a stable person only engaged in harassment or horseplay; and (2) Valentin was skilled enough with firearms to be allowed to engage in this sort of stupidity. Consequently, the record gives rise to an inference that Valentin's police-officer status was a sine qua non of the bystander officers' non-intervention. In my view, this inference establishes that Valentin was acting under color of state law.

The majority suggests that Martinez's status as a police officer somehow reduced the likelihood that Martinez perceived Valentin to be acting with the imprimatur of the Commonwealth. See id. at 17 n.6. I believe the opposite conclusion is at least as likely to be true. After the bystander officers (including Trinidad, who had supervisory authority) failed to intervene during the initial rounds of abuse by Valentin, Martinez could well have concluded that this type of hazing of young officers was standard fare in the Loiza Street Precinct. Therefore, Martinez could well have believed that the Commonwealth acquiesced in Valentin's actions.

Because Valentin was acting under color of state law, I think it pellucid that DeShaney does not bar this suit. At most, DeShaney precludes civil rights actions against state actors under the Due Process Clause for failing to protect an individual against private violence. See 489 U.S. at 197. The DeShaney majority took pains to distinguish the case before it from situations where the state itself, through its own affirmative action prior to the complained-of non-intervention, limited the victim's freedom. Id. at 198-201 (contrasting situations where the state has taken custody of certain individuals and thereby incurred "some responsibility for [their] safety and well-being"). Here, the Commonwealth, acting through the person of Valentin, compromised Martinez's freedom by successively assaulting him three times with a loaded service revolver. See West, 487 U.S. at 49. In my view, this infringement was more than sufficient to support Martinez's substantive due process claim. DeShaney, 489 U.S. at 200 ("In the substantive due process analysis, it is the

State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarcerating, institutionalization, or other similar restraint of personal liberty — which is the 'deprivation of liberty' triggering the protections of the Due Process Clause.").

I believe it important to comment on three discrete parts of the majority opinion. The majority concedes that Valentin's use of his service revolver might arguably bring his actions within the color of state law. Ante at 16. This is the rejected on two grounds: that it was not raised in the district court or plaintiffs's appellate brief; and on the merits. I cannot help but wonder why the straw man approach was used. In any event, I disagree on both grounds.

Fairly construed, Martinez's argument that Valentin's status as an on-duty police officer made him a state actor incorporates the argument that Valentin used the indicia and tools of his trade (including his service revolver) to carry out the shooting. For me, this is more than enough to allow us to consider Valentin's use of his service revolver as a factor in determining whether he was a state actor.

I am also am troubled by the majority's finding that Martinez waived his equal protection claim. Id. at 22. As an initial matter, I think it important to state that the claim appears to have some substance. How, after all, can it be rational for bystander officers not to intervene simply because one of their own — as opposed to a civilian — is being victimized by violence? What legitimate state objective could such inaction serve?

The majority finds that Martinez abandoned this claim because he failed to "embellish" it sufficiently. Id. I do not think that the issue needed any embellishing. It was called an equal protection claim and stated relatively clearly: "If Wilfredo had been a private citizen, it seems clear that defendants-appellees would have realized that they were obliged under the law to protect him from the threat of serious damages." Appellant's Brief at 9. In my view, this was sufficient to put the claim in issue.

Finally, I think it important to refute the majority's suggestion that Valentin might not have been acting under color of state law even if Martinez had been a civilian. Ante at 17 n. 6 ("Had Martinez been a civilian rather than a fellow officer, the significance of Valentin's uniform and weapon for purposes of the color-of-law determination might well have been greater." (emphasis supplied). I find the suggestion remarkable. If a civilian had suffered the abuse Martinez experienced at the hands of an on duty, uniformed police officer using his service revolver in front

of other officers in a police station, well-settled precedent would dictate a finding that the civilian was victimized under color of state law. We should not even hint that this may not be so.

III. I also cannot agree with the majority's conclusion that an unargued qualified immunity theory provides an alternative ground for affirmance in this case. See id. at 18- 20.

Under the qualified immunity doctrine, "government officials performing discretionary functions [] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In determining whether a right was "clearly established" at the relevant point in time, courts must analyze it at the appropriate level of specificity. Thus, a right is not "clearly established" for qualified immunity purposes unless its contours are sufficiently clear to "that a reasonable official would understand that what he is doing violated that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The majority suggests that Martinez's right to have the bystander officers intervene on his behalf was "cloaked in uncertainty" and was "murky" at the time of the relevant events. I disagree. As the majority concedes, it was settled at the time of the events in this case that

> [a]n officer who is present at the scene [of an arrest] and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under section 1983 for his nonfeasance, provided that he had a realistic opportunity to prevent the other officer's actions.

Ante at 9 (citations and internal quotation marks omitted). In my view, this line of authority controls here.

The majority distinguishes this precedent by suggesting that it is inapplicable where the tortfeasor officer is not acting under the color of state law, and then concludes that Valentin was not so

acting here. For the reasons I have explained above (and despite the opinion of my esteemed colleagues), I do not think that an objectively reasonable police officer could have seen Valentin's actions as purely private. And because Valentin was acting under the color of state law, the aforementioned authority was sufficient to have informed defendants of their obligation to intervene on Martinez ' behalf. See, Anderson, 483 U.S. at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (citation omitted). If excessive force during the course of a lawful arrest requires intervention, so too should an assault with a deadly weapon taking place during the course of an entirely unlawful seizure. I therefore disagree with the majority's qualified immunity analysis.

IV. Police officers are entrusted with great powers — including the privileged use of force — for the very purpose of preventing lawless violence. When an officer abuses those powers in front of his peers, he in effect presumes their tacit acquiescence, if not outright approval. In this situation, the other officers have a constitutional duty to intervene. I therefore respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

WILFREDO MARTINEZ RODRIGUEZ

Plaintiff

v.

CARLOS LOPEZ FELICIANO, ET AL

Defendants

CIVIL NO: 89-692 (RLA)

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff Wilfredo Martinez Rodriguez filed a civil rights action alleging the following: plaintiff was a police officer working for the Loiza Street police station. On May 26, 1988, while he was at the police station, another police officer, co-defendant Angel Valentin Corali, pointed his revolver towards plaintiff's genitalia in the presence of most of the co-defendants making statements as "Are you afraid?" None of the other co-defendants did anything to prevent Valentin from doing that. Valentin approached plaintiffs, placed a finger in a hole in plaintiff's, drew his revolver, place the muzzle in plaintiff's pants at the belt and asked him if he was afraid. None of the other co-defendants did anything to prevent Valentin from doing that again. Once again, after a while, Valentin approached plaintiff, drew his revolver for the third time, cocked the hammer, pushed it down the front of plaintiff's pants and a second later, the revolver fired. The bullet ripped through plaintiff's penis, leaving him mutilated and permanently impotent. It is believed that plaintiff will remain permanently disabled as a result of his. (Docket No. 3-Amended Complaint at 6-10.)

Defendant Aida Velez Cardona, Director of the Human Resources Division, filed a motion to dismiss for failure to state a claim upon which relief can be granted (Docket No. 78) alleging that plaintiff failed to state a superior liability claim against her. Plaintiff filed an opposition (Docket No. 80) alleging that Velez failed to order further tests on Valentin in view of his psychological background. Plaintiff also filed an addendum to the opposition Docket No. 82) with exhibits which allegedly reflect that Velez incurred in gross negligence. Velez filed a reply (Docket No. 83 alleging that the only references made to her in the amended complaint only describe her duties as Director of the Human Resources Division. She also field a motion supplementing her motion to dismiss (Docket No. 127) with exhibits alleging that there is a lack of state action in this case.

Subsequently, Carlos Lopez Feliciano filed a motion to dismiss for failure to state a claim upon which relief can be granted (Docket No. 111) alleging that since Valentin was acting in his private capacity, he had no constitutional duty to intervene and protect plaintiff. Plaintiff filed an opposition (Docket No. 113)

alleging that whether or not Lopez Feliciano had a constitutional duty to intervene is irrelevant to the claims against him.

Defendants Israel Cajigas Franqui, Efren Gonzalez Vera, Juan Trinidad Marrero, Rafael Colon Pizarro and Luis A. Velez Rentas filed a motion for summary judgment (Docket No. 122) with a statement of uncontested facts, exhibits and a memorandum in support alleging that: 1) there is a lack of state action in the allegations against them; 2) plaintiff was no deprived of a constitutional right by them; 3) plaintiff failed to state that they were personally involved in the civil rights violation; 4) they cannot be held liable under a supervisory liability theory; and 5) they are shielded by qualified immunity. They also filed a motion to strike certain allegations in the complaint (Docket No. 131) alleging that whether or no they had a constitutional duty to intervene is irrelevant to the claims against them.

FAILURE TO STATE A CLAIM

It is well established that in ruling a motion to dismiss under Rule 12(b)(6) the material facts alleged in the complaint are to be ordered only if the plaintiff is not entitled to relief under any set of facts he could prove. Conley v. Gibson, 355, U.S. 41, 45-46 (1957); Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).

If pleading requirements become overly technical, parties may not be able to resist the urge to expend resources unduly on motions to dismiss. However, there are at least three "competing concerns" which speak in favor of requiring at least some level of particularity. First, a complaint that is too general will not give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Second, rising litigation costs and the associated impact of an improper litigation speak for requiring some specificity before permitting a claimant to "drag a defendant past the pleading threshold." Third, the burgeoning caseload crisis in the district courts weighs in favor of earlier disposition of baseless claims. See Boston & Maine Corp. v. Town of Hampton, 987 F.2d 855 (1st. Cir. 1993) (citations omitted).

A short and plain statement of the claim showing that the pleader is entitled to relief is all that is required under Fed. R. Civ. P. 8(a). The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to

the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Conley v. Gibson, 355 U.S. at 48; Boston & Maine Corp. Town of Hampton, 987 F.2d at 865.

Nevertheless, in many contexts beyond the scope of particularity requirements of allegations of fraud stated in the Federal Rules, First Circuit decisions have required at least a minimal level of factual particularity rather than mere allegations of conclusions. Boston & Maine Corp. Town of Hampton, 987 F.2d at 863. The degree of specificity with which the operative facts must be state in the pleadings varies depending on the case's content. Id. at 863; United States v. AVX Corp., 962 F.2d 108, 115 (1st Cir. 1992).

The need for specific factual support of general allegations is greater in civil right cases. Boston & Maine Corp. Town of Hampton, 987 F.2d at 863; Darthmouth Review V. Dartmouth College, 889 F. 2d 13, 16 (1st. Cir. 1989). The First Circuit has repeatedly warned that section 1983 cases require a fair degree of specificity, a foundation of material facts to survive a motion to dismiss. Gilbert v. City of Cambridge, 932 F.2d 51, 62, (1st Cir. 1982); Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1st. Cir. 1992). In the context of civil rights claims, the court needs not credit "unsubstantiated conclusions." Plaintiff cannot "rest on subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts . . . " Boston & Maine Corp. Town of Hampton, 987 F.2d at 863; Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52-53 (1st. Cir. 1990).

To bring an action under section 1983, a plaintiff must show both the existence of a federal constitutional or statutory right and some deprivation of that right as a result of defendant's action under color of state law. Watterson v. Page, 987 F.2d at 7. Plaintiff must allege "minimal facts . . . as to who did what to whom and why." Dewy v. University of New Hampshire, 694 F. 2d at 3.

Although the deprivation must result out of a defendant's personal involvement, the First Circuit has established standards for imposing superior liability under section 1983:
A superior may be found liable only on the basis of her acts or omissions . . . . It must be shown that the supervisor's conduct or

inaction amounted to a reckless or callous indifference to the constitutional rights of others . . . .

Finally, there must be an affirmative link between the street level of misconduct and the action or inaction of supervisory officials.

Gutierrez-Rodriguez v. Cartagena, 882 F. 2d 553, 599 (1st. Cir. 1989) (citations omitted).

It is clear that section 1983 permits recovery from a superior for serious physical harm only where the defendant acts intentionally or with an analogous state of mid usually described as deliberated indifference" to the deprivation of the victim's constitutional rights. "Deliberate indifference" means more than ordinary "negligence," and probably more than "gross negligence." Manarite v. Springfield, 957 F.2d 953, 956, (1st. Cir. 1992) (citations omitted).

When liability for serious harm is at issue, a plaintiff must demonstrate "deliberate indifference" by showing 1) an unusually serious risk; 2) defendant's actual knowledge of (or at least, willful blindness to that elevated risk; and 3) defendant's failure to take obvious steps to address said known serious risk; Id. at 956.

Using this standard in a case where a police officer shot an innocent plaintiff, the First Circuit found an officer's supervisor liable, because citizen complaints and prior incidents had made the supervisor aware of the policeman's frequently brutal behavior, and the supervisor and repeatedly dismissed complaints against the officer without making any effort to consider the officer's prior history of misconduct. The court found the disciplinary system to be "grossly deficient" and concluded that had a proper disciplinary system been in place, the officer would have been identified as an officer "prone to misconduct." Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 564-66 (1st. Cir. 1989).

Defendant Aida Velez Cardona

Velez filed a motion to dismiss alleging that plaintiff failed to state a superior liability claim against her. In the amended complaint plaintiff states that Velez was director of the Human Resources Division and mentions some of her alleged supervisory duties. (Amended Complaint at 2-3.) Plaintiff also alleged that all

supervisory defendants are liable under section 1983 pursuant to one or more of the applicable negligence standards, for several wrongdoings it allege din general. (Amended Complaint at 18).

However, plaintiff failed to state that Velez incurred in fault or at least deliberate indifference supporting the same with specific facts against her. I find that n view of plaintiff's failure to meet the above mentioned specificity requirements, plaintiff failed to state a supervisory liability claim against Velez.

Therefore, I recommend that Velez's motion to dismiss (Docket No.78) be granted.

Defendant Carlos Lopez Feliciano

Lopez-Feliciano, former Superintendent of the Police Department of Puerto Rico, filed a motion to dismiss alleging that since Valentin was acting in his private capacity, he had no constitutional duty to intervene and protect plaintiff. Plaintiff alleged that whether or not Lopez Feliciano had a constitutional duty to intervene is irrelevant to the claims against him.

Plaintiff's claim against Lopez Feliciano is one under the superior liability theory. Whether or not the Police of Puerto Rico had to protect plaintiff from the injuries caused by Valentin is irrelevant to Lopez Feliciano's Liability as supervisor of Valentin. Therefore, I recommend that Lopez Feliciano's motion to dismiss (Docket No. 11) be denied.

SUMMARY JUDGMENT

It is well settled summary judgment is granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material facts and that the moving party if entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp., v. Catrett, 477 U.S. 317, 324-25 (1986); Abbadessa v. Moore Business Forms, No. 92-1196, slip op. at 4 (1st. Cir. Mar. 2, 1993).

On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law, and a dispute is genuine if a reasonable jury could resolve it in favor of the nonmowing party. Nereida-Gonzalez v. Tirado-Delgado, No.

92-2084, slip op. at 5 (1st. Cir. Apr. 14, 1993); Massachusetts v. Secretary of Agric., 984 F.2d 514, 526 (1st. Cir. 1993) (citations omitted).

The moving party bears the initial burden of averring an absence of evidence to support the nonmoving party's case. After that burden is met, the nonmoving party may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Lawrence v. Northrop, 980 F.2d. 66, 68 (1st. Cir. 1992) (citations omitted). The First Circuit has repeatedly stated that the nonmoving party may not rest merely on conclusory allegations, improbable inferences, and unsupported speculations. The nonmoving party must present definite and competent evidence to rebut the motion. Pagano v. Portmaster Gen., 983 F.2d 343, 347 (1st. Cir. 1993); Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791, 794 (1st. Cir. 1992).

Defendants Israel Cajigas Franqui, Efren Gonzalez Vera, Juan Trinidad Marrero, Rafael Colon Pizarro, and Luis Velez Rentas.

These defendants are officers of the Police Department of Puerto Rico which, according to plaintiffs, were present when all of the relevant facts occurred and did nothing to prevent their fellow officer Valentin from incurring in the above mentioned acts.

They allege that, as officers, they had no constitutional duty to intervene to protect plaintiff since even assuming that they were aware that plaintiff was in imminent danger of harm from Valentin, the Constitutional imposes upon them no obligation to prevent that harm.

Nothing in the language of the due process clause requires the sate to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act. not as a guarantee of certain minimal levels of safety and security. DeShaney v. Winnebago Dep't of Social Servs, 489 U.S. 189, 195 (1989).

The state's responsibility to protect individuals from private violations is limited to those situations in which said person is in the custody of the state and is, therefore, unable to act on its own behalf. Id at 200.

In this case the record reflects that the fact that plaintiff was not under the custody of the state is not in issue. Therefore,

these defendants, as state officers, had no constitutional duty to intervene in the alleged events. Moreover, even assuming that the defendants incurred in any type of negligence, due process does not transform every tort committed by a state actor into a constitutional violation. Id, at 202.

Since, in light of DeShaney, plaintiff's allegations clearly fail to give rise to the level of a constitutional deprivation, the claims against these defendants should be dismissed. Cf. Burgos v. Camareno, 708 F. Supp. 25, 26, (D.P.R. 1989) (holding that, in light of DeShaney, failure of city and city official to provide business owners with adequate protection against burglaries did not violate due process and could not form basis for federal civil rights action).

In view of the above, I recommend that defendants' motion for summary judgment (Docket No. 122) be granted. The motion to strike (Docket No. 115) filed by these defendants will become moot if these report and recommendation is adopted.

Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140 (1985); Borden v. Secretary of Health & Human Servs., 836 F.2d 4, 6 (1st. Cir. 1987); Scott v. Schweiker, 702 F.2d. 13, 14, (1st.Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st. Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co, 616 F.2d 603 (1st. Cir. 1980).

At San Juan, Puerto Rico, this 11th day of May, 1993.

JUSTO ARENAS
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

WILFREDO MARTINEZ RODRIGUEZ

Plaintiff

v.

CARLOS LOPEZ FELICIANO, ET AL

Defendants

CIVIL NO: 89-692 (RLA)

ORDER RULING OR REPORT AND RECOMMENDATION AND DISMISSING UNKNOWN DEFENDANTS

The court, having considered the responses to the Magistrate's Report and Recommendation filed by plaintiff as well as by codefendant CARLOS LOPEZ FELICIANO hereby finds as follows.

The Court agrees with the Magistrate's determination that the claims asserted against AIDA MYRNA VELEZ CARDONA and te following police officer warrant dismissal: ISRAEL CAJIGAS FRANQUI, EFRAIN GONZALEZ VERA, JUAN TRINIDAD MARRERO, RAFAEL COLON PIZARRO, and LUIS A. VELEZ RENTAS. Accordingly, the Magistrate's recommendation filed on May 11, 1993, (docket No. **145**) is hereby **ADOPTED** insofar as terminating these particular defendants to this case. Plaintiff's Opposition to the Magistrate's Report and Recommendation filed on June 30, 1993 (docket No. **148** is **DENIED**.

Additionally, the Court will dismiss JOSE A. RODRIGUEZ as well as the conjugal partnership constituted by him and AIDA VELEZ CARDONA inasmuch as no remedy lies against them in these proceedings.

Further, we find that the complaint should also be dismissed as to CARLOS J. LOPEZ FELICIANO based on the arguments presented by counsel in response to the Magistrate's ruling. Accordingly, his Motion Requesting Reconsideration of Report and Recommendation filed on June 22, 1993 (docket no **147**) is hereby **GRANTED** and the Magistrate's recommendation is **REJECTED** on this specific issue. The Motion Requesting Ruling or Hearing... filed by codefendant on August 20. 1993 (docket **149**) is hereby **DENIED AS MOOT**.

Lastly,, the complaint filed against any and all unknown defendants is hereby DISMISS.

Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 9th day of november, 1993.

RAYMOND L. ACOSTA
United States Magistrate Judge